UNITED STATES v. LOUISVILLE.[1]

APPEAL FROM THE COURT OF CLAIMS.

No. 105. Argued January 5, 6, 1898. — Decided February 21, 1898.

The act of March 3, 1891, c. 540, providing for the payment to the city of Louisville of the amount found due under the act of June 16, 1890, c. 424, was in the nature of a judgment, final in its character, and subject to no appeal, and the duties of the officers of the Government thereafter charged with the payment of the moneys appropriated by that act were not discretionary, and were limited to the clerical functions of making payment as directed by the act.

By the act of February 25, 1893, c. 165, making provision for the payment of further and other claims of the same character, Congress did not intend to in anywise open the transactions which had been closed by the payment of the moneys directed in the act of 1891.

This is an appeal from a judgment of the Court of Claims in favor of the city of Louisville, based upon a petition filed in that court for the recovery of seventeen thousand and some odd dollars, alleged to be due the city from the Government on account of taxes improperly collected.

It appears that between the years 1862 and 1872 the city of Louisville, Kentucky, owned a large amount of bonds and stock of the Louisville and Nashville Railroad Company, upon which the company paid interest and declared cash dividends, retaining, however, during most of the time an undistributed surplus. Under the internal revenue law, § 122, act of June 30, 1864, c. 173, 13 Stat. 223, 284, in force during this period, the company paid taxes to the United States upon its gross receipts, its undistributed surplus, the interest payable on its bonds, and its cash dividends. The taxes paid on interest and dividends were deducted from the amounts due as interest and dividends, so that the revenues of the city of Louisville accruing from these sources were diminished to the extent of such deductions;

[1] The docket title of this case is "The United States, Appellant, v. The Commissioners of the Sinking Fund of the City of Louisville, and the City of Louisville."

but these deductions were not known to the Commissioners of the Sinking Fund of the city until the time had expired for an application to the Government to be repaid the taxes so deducted.

In 1872, in the case of *United States* v. *Railroad Company*, 17 Wall. 322, this court decided that a tax under the above-named section 122 of the internal revenue act, upon the interest on bonds issued by a railroad company, was a tax upon the creditor and not upon the corporation paying it, and that a municipal corporation, being a portion of the sovereign power of a State, was not subject to taxation by Congress upon its municipal revenues.

The time for making application for repayment of the taxes thus illegally obtained having passed, Rev. Stat. §§ 3220, 3228, resort was had to Congress, which enacted the statute approved June 16, 1890, c. 424, 26 Stat. 157. The statute authorized and required the Secretary of the Treasury and the Commissioner of Internal Revenue "to audit and adjust the claim of the board of sinking fund commissioners of the city of Louisville, Kentucky, for internal revenue taxes on dividends on shares of stock owned by said board for said city of Louisville in the Louisville and Nashville Railroad Company, to the extent such taxes were deducted from any dividends due and payable to said board, and to pass upon said claim and render judgment thereon, in the same manner and with the same effect as if said claim had been presented and prosecuted within the time fixed and limited by law."

Pursuant to the provisions of this act, the city of Louisville presented to the proper officers of the Treasury Department its claim to recover taxes to the amount of $65,578.32, of which the officers allowed $42,514.03, the latter sum being made up, as stated, of two items, one of $24,801.14, taxes which had been deducted from cash dividends, and $17,712.89, taxes which had been deducted from surplus profits which, on the 17th of November, 1867, had been set apart by resolution of the board of directors of the railroad company as the basis of a stock dividend, which was directed to be distributed in February, 1868. The amount of $42,514.03, having been

audited and allowed, was reported by the Secretary of the Treasury to Congress for its action, there being no appropriation from which the money awarded the city could be paid.

Under the act of March 3, 1891, c. 540, being an appropriation to supply deficiencies, 26 Stat. 862, at 867, Congress provided as follows: "Payment to city of Louisville, Kentucky: For payment to the city of Louisville, Kentucky, the amount found due, under the act of Congress approved June 16, 1890, and reported to Congress in House Executive Document No. 260, of the present session, $42,514.03." The amount thus appropriated was duly paid to the city, as directed by Congress.

Subsequently another application was made to Congress, and that body passed the act approved February 25, 1893, 27 Stat. 477, a copy of which is set forth in the margin.[1]

Under this act the city of Louisville applied to the proper officers of the Government for a further refund of $34,667.80 on account of taxes claimed to have been illegally exacted. One item in this last-named claim, amounting to $3008.40,

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[1] "Chap. 165. An act for the benefit of the State of Kentucky, Logan and Simpson Counties, and of Louisville, Kentucky, and of Sumner and Davidson Counties, Tennessee.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, be, and he is hereby, authorized and required to audit and adjust the claims of the Sinking Fund Commissioners of the State of Kentucky, of Logan and Simpson Counties in said State, of the city of Louisville, Kentucky, and of Sumner and Davidson Counties, Tennessee, for internal revenue taxes collected on railroad dividends on stock and on interest on railroad bonds owned by said counties and city, respectively, in the Louisville and Nashville Railroad Company, and of said State for internal revenue taxes collected and interest on railroad bonds of the railroad from Louisville to Lexington and on dividends on stock of said railroads owned by said State, and due and payable to said Boards of Sinking Fund Commissioners, respectively, and to said State, counties and city, to the extent that such taxes were deducted from any dividends or interest due and payable to such boards, respectively, and which have not been heretofore refunded, and for this purpose any statute of limitations to the contrary notwithstanding, sections nine hundred and eighty-nine, thirty-two hundred and twenty, thirty-two hundred and twenty-six, thirty-two hundred and twenty-seven, and thirty-two hun-

Counsel for Appellants.

the appellants insist was for taxes collected by the Government from the railroad company upon its undistributed surplus in 1868 and 1871, and that this item had been included in the claim presented in 1890, but had not been allowed because, as stated in the determination made by the Commissioner of Internal Revenue, the act of June 16, 1890, under which the application for refunding was made, limited an adjustment of the claim "to the extent that such taxes were deducted from any dividends due and payable, and did not direct the adjustment of the claim to the extent that taxes were deducted from interest or gross receipts."

The Acting Commissioner of Internal Revenue audited and adjusted the claim made under the act of 1893, at its full amount, and as incidental to such audit and adjustment he assumed to reëxamine the claim allowed in 1891. The result of such reëxamination of the latter claim was a reduction to the extent of $3548.89, which sum was deducted from the amount allowed under the act of 1893, reducing it to the sum of $31,359.02. When the claim reached the First Comptroller a further sum of $17,633.85 was deducted by him, which consisted principally of the amount allowed and paid in 1891 for taxes on surplus, which left a balance payable to the city of $13,725.17, for which sum the Comptroller directed a draft to be issued. To recover the amount thus deducted from the claim as audited and allowed under the act of 1893, the city of Louisville commenced this proceeding in the Court of Claims, which rendered judgment in its favor for the amount demanded. The Government brought the case here for review.

Mr. Charles C. Binney for appellants. *Mr. Assistant Attorney General Pradt* was on his brief.

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dred and twenty-eight of the United States Revised Statutes are hereby made applicable and available with the force and effect, as if protest and demand for payment had been made within the time prescribed by said sections; and the amounts, when ascertained, as aforesaid and not heretofore refunded, shall be paid out of the permanent annual appropriation provided for similar claims allowed within the present fiscal year.

"Approved February 25, 1893."

Mr. Alphonso Hart for appellees. *Mr. Fontaine T. Fox* was on his brief.

MR. JUSTICE PECKHAM, after stating the facts, delivered the opinion of the court.

The claim here made is that the officers of the Government committed an error in auditing and allowing the amount paid in 1891 for taxes on surplus, as those taxes, it is said, were not referred to in the act of 1890 and should not have been reported to Congress or ordered paid by it, and that the power to review this action (if not previously existing) was created by the act of 1893, above set forth.

We think the judgment of the Court of Claims is right. By the payment under the act of 1891 the questions involved were ended. It was not only an auditing and allowance by the proper officers of the Treasury of a claim over which they had jurisdiction, but the amount was paid under the direct commandment of an act of Congress specifically appropriating the particular sum reported to it as due to the city of Louisville and for the payment of which the authority of Congress was needed.

Laying for a moment the act of 1893 out of view, it seems clear to us that there was no power on the part of the officers of the Treasury to reëxamine the correctness of the claim paid by virtue of the act of 1891, or to reverse that action on the ground that a mistake of law had been made in the decision reported to Congress upon which it passed the act last named. The officers who acted under the statute of 1890 (the Secretary of the Treasury and the Commissioner of Internal Revenue) performed their duties in examining, auditing and allowing the claim as they thought the facts and the law required. It was not the case of an allowance of an ordinary claim against the Government by an ordinary accounting officer, any more than was the case of *United States* v. *Kaufman*, 96 U. S. 567, 570, or that of *United States* v. *Savings Bank*, 104 U. S. 728. When the decision of these officials was by the Secretary of the Treasury reported to Congress and an appropriation made

by that body in 1891 of the specific sum mentioned in the report, with directions to pay the amount thus appropriated to the city of Louisville, the time for examination had passed, and it was the duty of the proper officers of the Government to pay the money as directed by the statute.

We also think the subsequent statute of 1893 gave no right to the Treasury officers to interfere with or in any manner to review the action of the Government under the statutes of 1890 and 1891. It may be true that a small portion of the claim made by the city under the act of 1893 had theretofore been made under the act of 1890, but that portion had then been rejected and, of course, never audited, allowed or paid. Because a small sum which had once been rejected was included in the principal claim made by the city in 1893, no sort of foundation was thereby laid for the assertion of a right on the part of the Government to review and, in substance, reverse the prior action of the Treasury Department in allowing a claim which had been thereafter affirmed by Congress with a substantial direction to pay the amount thereof, and which had been paid accordingly.

The authority given by the act of 1893 required the officers therein named to audit and adjust the claims of the city of Louisville for internal revenue taxes to the extent that such taxes were deducted from any dividends or interest due and payable to the city *and which had not been theretofore refunded*, and for this purpose the statute of limitations was repealed and certain sections of the Revised Statutes were made applicable, and the amounts, when ascertained and not theretofore refunded, were directed to be paid out of the permanent annual appropriation provided for similar claims allowed within the present fiscal year (1893). We think this provision gave no jurisdiction to interfere with or to review the action of the Treasury officials under the act of 1890, or the action of Congress in enacting the statute of 1891.

The act of 1891 was in the nature of a judgment, final in its character, and subject to no appeal, and the duties of the officers of the Government thereafter charged with the payment of the moneys appropriated by that act were not discretionary,

Counsel for Parties.

and were limited to the clerical functions of making payment, as directed by the act. *United States* v. *Jordan*, 113 U. S. 418. It cannot be possible that Congress had the least intention, when making provision for the payment of other and further claims of the same character, to in anywise open the transactions which had been closed by the payment of the moneys directed by the act of 1891. We have no doubt whatever that if Congress had any such intention it would have made it clear by the use of far different language from that which is contained in the act of 1893. It would have said, in so many words, that, in proceeding under the statute of 1893, the officers named therein should examine into the correctness of the decisions arrived at in 1890 and 1891.

The judgment of the Court of Claims was right, and it should, therefore, be

Affirmed.

LOGAN COUNTY *v.* UNITED STATES.[1]

APPEAL FROM THE COURT OF CLAIMS.

No. 167. Argued January 5, 6, 1898. — Decided February 21, 1898.

Where a railroad company pays a tax on its undistributed surplus under the internal revenue act of June 30, 1864, c. 173, 13 Stat. 223, it is thereby paying a tax upon its own property, and such payment cannot be regarded as a payment of a tax upon a stock dividend thereafter declared by the company.

THE case is stated in the opinion.

Mr. Charles C. Binney for appellants. *Mr. Assistant Attorney General Pradt* was on his brief.

Mr. Alphonso Hart for appellees. *Mr. Fontaine T. Fox* was on his brief.

[1] The docket title of this case is "The Commissioners of the Sinking Fund of Logan County and the County of Logan, Kentucky, Appellants, *v.* The United States."

Opinion of the Court.

MR. JUSTICE PECKHAM delivered the opinion of the court.

This application was made to recover taxes heretofore paid, and, like the one in the preceding case, it is based upon the statement that the tax could not be imposed as against the county of Logan, because it was a municipal corporation, and not subject to taxation by Congress upon its municipal revenues. *United States* v. *Railroad Company*, 17 Wall. 322. Therefore, if it appear that the railroad company has deducted from the dividend due the county the amount of any tax paid to the Government on a stock dividend issued by the company, the appellants are entitled to recover. The facts are quite simple.

On the 14th of March, 1894, the appellants filed their petition in the Court of Claims for the refunding of taxes which they claimed to be entitled to under the act of February 25, 1893, c. 165, 27 Stat. 477. The act is set out in full in the margin in the preceding case of *United States* v. *City of Louisville*, *ante*, p. 249. The claim made herein was for internal revenue taxes alleged to have been illegally assessed, and amounting to the sum of $17,606.14. Under the provisions of the statute above cited the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, audited and adjusted this claim at the sum of $15,397.75, and in due course of procedure it came to the Comptroller of the Treasury, who directed a warrant to issue for the sum of but $9533.54 (the total amount withheld from the county on account of taxes on cash dividends), and he refused to include in the warrant the sum of $5864.21, being the balance of the $15,397.75 which had been audited and adjusted as above mentioned, because, as the Comptroller held, the claim for taxes paid on account of stock dividends was illegal and unauthorized, and this suit is brought to recover the sum which was rejected by the Comptroller, and which he refused to pay. The Court of Claims gave judgment in favor of the Government and dismissed the petition of claimants, who have appealed to this court from the judgment of dismissal.

The point first made by the counsel for the claimants is

that the audit and adjustment made by the Commissioner of Internal Revenue, and approved by the Secretary of the Treasury, under the act of Congress of 25th of February, 1893, was an award having all the force of a judgment which could not be questioned either by the Comptroller of the Treasury or by the courts, except for fraud or mistake. The cases of *United States* v. *Kaufman*, 96 U. S. 567, and *United States* v. *Savings Bank*, 104 U. S. 728, are cited for the purpose of showing the conclusiveness of the action of the officers above named.

All that those cases hold is, that where in a case somewhat similar to this the claim had been allowed by the officers named in the statute, "the allowance may be used as the basis of an action against the United States in the Court of Claims, where it will be *prima facie* evidence of the amount that is due, and put on the Government the burden of showing fraud or mistake. This burden is not overcome by proving that some other officer in the subsequent progress of the claim through the department declined to do what the law or Treasury regulations required of him before payment could be obtained. The fact of fraud or mistake must be established by competent evidence, the same as any other fact in issue. An allowance by the commissioner in this class of cases is not the simple passing of an ordinary claim by an ordinary accounting officer, but a statement of accounts by one having authority for that purpose under an act of Congress." *United States* v. *Savings Bank*, 104 U. S. 728, at 733. The question of the conclusiveness of the action of the officers of the Government under their general powers is also referred to in *Wisconsin Central Railroad* v. *United States*, 164 U. S. 190, and it is there held that the Government is not bound by the act of its officers in making an unauthorized payment under misconstruction of the law. However, the act of the Commissioner of Internal Revenue and the Secretary of the Treasury in approving the claim may be assumed to be *prima facie* evidence that the amount so approved by them was due the claimant from the Government, and the burden therefore rested upon the Government of showing that the allowance of

the amount claimed in this proceeding was made through a mistake on the part of those officials. Unless this mistake is made apparent by the findings of the court below, its judgment in refusing to give effect to the allowance of the Commissioner of Internal Revenue, approved by the Secretary of the Treasury, might have to be reversed. If, however, the findings show that those officials did make a mistake in allowing that portion of the claim made which is now in suit, the judgment of the court below, so far as this point is concerned, must be affirmed.

The defence made by the Government upon the merits is based on the provisions of the statute of 1893, and upon the allegations that the findings of the court below substantially show there were no taxes paid upon any stock dividends declared in 1867 or 1868. It is added that the claim on the part of the county of Logan was not in reality for any taxes actually paid on "dividends in scrip" or "stock dividends" issued to appellants, but that it was for a certain proportion of the taxes paid by the railroad company on that part of its profits which were not distributed in dividends, and which in fact constituted what the internal revenue acts of 1864 and 1866 called "profits carried to the account of any fund or used for construction," and which funds were taxable under those acts, as the property of the corporation.

Counsel insists that a tax upon undistributed profits in the treasury or belonging to the corporation is like a tax on gross earnings, a tax on the corporation on account of its own property, and not to be thereafter recovered by this claimant, either under the act of 1893 or under those sections of the United States Revised Statutes therein alluded to.

It must be remembered that the Court of Claims under the act of 1893 was simply given jurisdiction to examine a claim which was otherwise barred by the statute of limitations. The act gave no other right and created no claim against the Government not otherwise existing. The right of recovery for an illegal tax had been provided for by the Revised Statutes of the United States, section 3220, and that remedy could have been pursued for two years after the payment of

any such tax. Rev. Stat. § 3228. In this case the time thus limited had expired, and the act of 1893 was passed for the purpose of setting aside the bar of the then existing statute. The right to demand the refunding of the money in dispute must depend therefore upon the question whether any tax on a stock dividend had been collected from the company by the Government, and a proportionate amount thereof deducted by the company from the dividend otherwise due the county. No deduction of any tax from the scrip dividend due to the claimant was ever made in terms. It is sought to be inferred from the fact that a prior payment of a tax by the company on its undistributed surplus had thereby diminished that fund by the amount of the tax, and that a stock dividend must be assumed to represent profits not distributed in cash dividends, and that the claimant would have received more stock if the profits had not been diminished by the payment of the tax from which it is said a municipal corporation was exempt under the decision of the Supreme Court in the case of *Wisconsin Central Railroad* v. *United States*, above cited. Of course, the payment of the tax diminished the profits of the company by just that amount. But, at the time when it was paid, the full amount thereof was due the Government from the company itself, and not one penny could properly have been deducted from the amount of the tax by reason of the fact that a municipal corporation owned a certain amount of the stock of the company. All taxes which were levied on the property of the company were payable in their full amount by the company, and not a dollar could be legally deducted from such tax on account of the character of any owners of its stock. Consequently, when a stock dividend is declared, the fact that the directors might have chosen to declare a larger one if it had not been for the payment of the taxes the company had made on its own property, is entirely immaterial. So is the fact, if it be a fact, that the total stock dividend was reduced by the amount which the company had theretofore paid as a tax upon its undistributed surplus.

There is no finding of the court below which in terms shows that the tax in question here was ever paid on a "stock" or

"scrip" dividend. All that appears is that a stock dividend of forty per cent on its capital was declared by the railroad company by a resolution adopted on the 16th of November, 1867, which provided that the stock should be issued on February 10, 1868.

The court below did find that prior to the passage of the act of February 25, 1893, certain proceedings had theretofore taken place in the Treasury Department relative to the same taxes paid by the same railroad company. (The court in this finding referred to the proceedings in regard to the claim made by the city of Louisville for a return of taxes, under the circumstances detailed in that case, just decided, *ante*, p. 249, and which are therein set forth.)

The court then set forth in this case the finding made in the *Louisville case*, and in that case, after speaking of the fact that cash dividends had been declared upon the stock of the railroad company, and that there existed a large amount of undistributed surplus in the treasury of the railroad company, the finding continued: "These cash dividends and the undistributed surplus which was converted into stock or scrip dividends were held by the officers of the Government to be subject to taxation, and taxes were assessed and collected according to the terms of the statute in force at the time of the respective collections."

Taking all the facts as found by the court below, it appears that the only tax paid was paid on the undistributed surplus of the company while it remained such surplus in its hands and while it was a portion of its own property, as much so as anything else owned by it, and that thereafter the company declared a stock dividend of forty per cent upon its old capital.

By the provisions of the internal revenue act of 1864, section 122, a stock dividend was subject to a tax of five per cent. So far as material the section provides: "That any railroad . . . that may have declared any dividend in scrip, or money due or payable to its stockholders, as part of the earnings, profits, income or gains of such company, and all profits of such company carried to the account of any fund,

or used for construction, shall be subject to and pay a duty of five per centum on the amount of all such interest, or coupons, dividends or profits, whenever the same shall be payable; and said companies are hereby authorized to deduct and withhold from all payments, on account of any interest, or coupons and dividends due and payable as aforesaid, the duty of five per centum," etc.

Under this plain provision of the statute it is perfectly clear that the stock dividend in question was a proper subject of taxation. But, as already mentioned, there is no finding that any such tax has been paid, and, of course, none that any deduction on its account was ever made from any dividend due the county. On the contrary, from the findings that have been made, it appears that the only tax which has been paid was paid by the railroad company upon its undistributed surplus at a time when such fund was its own absolute property. That fact, taken in connection with the declaration of the dividend of forty per cent upon the amount of the capital of the railroad company, does not show a payment of the tax on the stock dividend declared under the resolution mentioned.

It is plain that this surplus fund, which, at the time it was taxed, belonged to the company, was not distributed to the stockholders, nor was it converted into stock by reason of the stock dividend. If it had been a cash dividend sufficiently large in amount to cover the surplus, then the payment of the dividend would have affected the distribution of the fund. But no distribution could take place by any stock dividend. Such a dividend distributed nothing but stock, which made the stockholder neither richer nor poorer than he was before it was issued.

Although the court finds that the undistributed surplus of the railroad company was held by the officers of the Government to be subject to taxation, and taxes were assessed and collected according to the terms of the statute in force at the time of the respective collections, yet such fact does not advance us a step in the direction of showing that any duties were paid on the stock dividend. The tax or duties had been

paid by the company on a fund which then belonged to it. Unless payment of the tax on this undistributed surplus was in substance a payment of the five per cent tax on the stock dividend, then there is no finding that any such payment was ever made. That payment cannot be so regarded because the tax on the undistributed surplus was a tax upon the property of the company and was paid as such by the company, and if the amount thereof were deducted by the company from its subsequent stock dividend, that would be an act of the company, and would not render the prior payment of the tax on the undistributed surplus improper even with regard to Logan County. Otherwise all payments of taxes made by a company upon its own property would be subject to a deduction proportioned to the amount of its stock held by States or other corporations of a municipal character. The adoption of the resolution for a stock dividend, together with the issue of the stock, could have absolutely no effect upon the undistributed surplus fund, so far as any distribution thereof was concerned. The shareholder got no more interest in or right to that fund than he had before, and the prior payment of the tax upon it did not thereby decrease the amount of the forty per cent dividend upon the old capital by a penny. And yet it is only upon the payment of the tax which the company made on its property, in the shape of its undistributed surplus, that the claimants can by this record found their claim to recover their proportion of such tax. If allowed, then the claimant could, upon the same reasoning, recover its proportion of every tax paid by the company upon any other of its property, unless the statute of limitations applied. If the company in fact reduced its stock dividend by the amount of the tax which it had previously paid on the surplus fund belonging to it, such fact gives no support to the claim of the county to recover from the Government an amount of a perfectly legal tax. And as before stated, the proof really is that there was no other payment of a tax than one upon the surplus as the property of the company.

An effort is made to show that this payment of a duty or tax on the undistributed fund might be treated as a payment

of such duty or tax on the stock dividend, under the proviso contained in section 121 of the statute of 1864, which reads: "*Provided*, That when any dividend is made which includes any part of the surplus or contingent fund of any . . . railroad company, which has been assessed and the duty paid thereon, the amount of duty so paid on that portion of the surplus or contingent fund may be deducted from the duty on such dividend."

It is perfectly apparent that this proviso includes only cash dividends. It is a dividend which is to include for distribution any part of the surplus or contingent fund of a railroad or other company. How can a stock dividend distribute a fund? As already remarked, a stock dividend distributes nothing but stock. Hence, there is no sense in applying the statute to a case where no distribution of a fund is made and where the fact of a double payment on the fund cannot arise. The proviso clearly refers to a case where a surplus has already paid duty and where subsequently to that time it is distributed to the shareholders. Under such circumstances that portion of the dividend which has thus once paid its duty of five per cent is not to be taxed again when distributed to the shareholders. But so long as there is no distribution, the tax paid on the surplus as surplus and which belonged to the corporation when the tax was paid, is not to be credited on or deducted from a subsequent tax upon a stock dividend which does not distribute the surplus nor in any manner change its ownership.

We agree, therefore, with the opinion of the court below, and we hold that where a railroad company pays a tax on its undistributed surplus under the act of 1864, it is thereby paying a tax upon its own property, and that such payment cannot be regarded as a payment of the tax upon a stock dividend thereafter declared by the railroad company.

The judgment of the Court of Claims should, therefore, be

Affirmed.